



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 3

RIN 2900-AN28

Dental Conditions

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as a final rule the proposal to amend its adjudication regulations regarding service connection of dental conditions for treatment purposes. This amendment clarifies that principles governing determinations by VA's Veterans Benefits Administration (VBA) for service connection of dental conditions for the purpose of establishing eligibility for dental treatment by VA's Veterans Health Administration (VHA), apply only when VHA requests information or a rating from VBA for those purposes. This amendment also clarifies existing regulatory provisions and reflects the respective responsibilities of VHA and VBA in determinations concerning eligibility for dental treatment.

DATES: Effective Date: This amendment is effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Arlene George, M.D., MPH,
Regulations Staff (211D), Compensation Service, Veterans Benefits
Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW,
Washington, DC 20420, (202) 461-9700. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the Federal Register on March 17, 2011 (76 FR 14600), VA proposed to amend 38 CFR 3.381, which identifies some of the circumstances under which dental conditions that may not qualify as disabilities for purposes of VA disability compensation may nevertheless be service connected for purposes of VA dental treatment under 38 U.S.C. 1712 and 38 CFR 17.161; clarifies existing regulatory provisions; and reflects the respective responsibilities of VHA and VBA in determinations concerning eligibility for dental treatment. We proposed redesignation of paragraphs (a) through (f) as paragraphs (b) through (g) and the addition of new paragraph (a) that explains the situations when VHA will refer a claim to VBA. We also proposed to amend redesignated paragraph (b) to clarify what conditions will be service connected for treatment purposes. Additionally, we proposed removal of the following sentence from redesignated paragraph (c): “When applicable, the rating activity will determine whether the condition is due to combat or other in-service trauma, or whether the Veteran was interned as a prisoner of war.” This sentence is being removed because it is repetitive of portions of paragraph (a).

Interested persons were invited to submit written comments to VA on or before May 16, 2011. In response to the proposed rule, VA received four (4) public comments. Of these comments, two were beyond the scope of the rulemaking: One involved comprehensive dental care for children of Vietnam veterans born with spina bifida and the other suggested revision of the criteria for service personnel to obtain dental care. Therefore, no changes were made based on these comments.

Of the two remaining comments, one was two-fold. The commenter expressed concerns about the procedure for timely processing Class 5 rating requests; this is beyond the scope of this rulemaking, which addresses only the circumstances under which VBA will make adjudicatory determinations needed by VHA to determine eligibility for dental care. The commenter also suggested that the language of the proposed rule pertaining to Class 6 eligibility is “vague and open to broader interpretation than the examples provided.” This comment also exceeds the scope of this rulemaking. In providing background information on the various circumstances in which VHA provides dental care to veterans, the preamble to the proposed rule notice referred to veterans “[w]ho are scheduled for admission or otherwise receiving care under 38 U.S.C. chapter 17 if dental care is reasonably necessary to the provision of such care and services” and listed as “examples” several types of surgery for which dental care may be necessary to minimize the risk of complications due to infection from dental conditions. The examples provided are not intended to be an exhaustive list, but rather merely examples of medical conditions commonly associated with greater

health risks when combined with poor dentition. The preamble language is reflective of 38 CFR 17.161, which sets forth the criteria concerning eligibility for treatment and which we did not propose to revise. To the extent the commenter suggests that we revise such criteria, the comment is beyond the scope of this rulemaking. No changes were made based on this comment.

The fourth commenter suggested VA broaden the scope of the determinations listed in the proposed rule for greater consistency with 38 U.S.C 1712 and 38 CFR 17.161(i) and (j). The intent of the proposed rule is not to reiterate all potential bases for eligibility for dental treatment listed in 38 U.S.C 1712(a)(1)(A)-(H) and 38 CFR 17.161(i) and (j), but to clarify VBA's role in making determinations on such matters. Further, the phrase "include, but is not limited to" indicates that the matters listed were intended as examples rather than an exclusive list. Thus, the matters referenced in 38 U.S.C 1712 and 38 CFR 17.161(i) and (j) are not excluded. Therefore, no changes were made based on this comment.

Based on the rationale set forth in the preamble to the proposed rule and in this preamble, VA is adopting the proposed rule as a final rule without changes.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule would not affect any small entities. Only certain VA beneficiaries could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another

agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are 64.011, Veterans Dental Care; and 64.109, Veterans Compensation for Service-Connected Disability.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on December 6, 2011, for publication.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Radioactive materials, Veterans, Vietnam.

Dated: January 24, 2012

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons stated in the preamble, VA amends 38 CFR part 3 as follows:

PART 3 — ADJUDICATION

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

2. Amend § 3.381 by:

- a. Redesignating paragraphs (a) through (f) as paragraphs (b) through (g).
- b. Adding new paragraph (a).
- c. Revising newly redesignated paragraph (b).
- d. Removing the last sentence from newly redesignated paragraph (c).

The addition and revision read as follows:

§ 3.381 Service connection of dental conditions for treatment purposes.

(a) The Veterans Benefits Administration (VBA) will adjudicate a claim for service connection of a dental condition for treatment purposes after the Veterans Health Administration determines a veteran meets the basic eligibility requirements of § 17.161 of this chapter and requests VBA make a determination on questions that include, but are not limited to, any of the following:

- (1) Former Prisoner of War status;
- (2) Whether the veteran has a compensable or noncompensable service-

connected dental condition or disability;

(3) Whether the dental condition or disability is a result of combat wounds;

(4) Whether the dental condition or disability is a result of service trauma;

or

(5) Whether the veteran is totally disabled due to a service-connected disability.

(b) Treatable carious teeth, replaceable missing teeth, dental or alveolar abscesses, and periodontal disease are not compensable disabilities, but may nevertheless be service connected solely for the purpose of establishing eligibility for outpatient dental treatment as provided for in § 17.161 of this chapter. These conditions and other dental conditions or disabilities that are noncompensably rated under § 4.150 of this chapter may be service connected for purposes of Class II or Class II (a) dental treatment under § 17.161 of this chapter.

* * * * *

[FR Doc. 2012-1873 Filed 01/27/2012 at 8:45 am; Publication Date: 01/30/2012]